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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1967
NO. 623

DOUGLAS LANTZ, d/b/a
ALASKA TRUCK TRANSPORT, INC.,

Appellant,

v.

LYNDEN TRANSFER, INC., et al.

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLANT IN OPPOSITION TO MOTION TO AFFIRM

FOREWARD

Appellant's Statement as to Jurisdiction sets forth the basis of this Court's jurisdiction over this appeal, the statement of the case, and a statement of the questions presented, and contains references to the opinion of the District Court, the report of the Interstate Commerce Commission, and the applicable statutory provisions.

The Interstate Commerce Commission is sometimes referred to hereinafter as the Commission.

There has been an intervening matter in that at a general session of the Commission on May 3, 1967 it deleted in conformance with the United States District Court Decree in Civil Action No. 289

certain authorities in MC-118520 Sub 3. In this same order the Commission took the almost unprecedented action of reopening this proceeding for further oral hearing. It was subsequently set for hearing July 18, 1967 in Anchorage, Alaska.

Time for filing this brief, originally due Sept. 20, 1967, was extended until Oct. 20, 1967 and subsequently extended until Nov. 7, 1967.

It is appellant's position that the questions raised by this appeal are substantial and of general public importance and merit full consideration by this Court and that the judgment of the District Court should be reversed.

SUMMARY OF ARGUMENT

In this proceeding the full Commission reversed the findings of the Review Board, which had modified the original findings of the hearing officer, Chief Examiner James C. Cheseldine. The full Commission's findings were substantially identical to those of the hearing examiner. It found the operations of appellant to be under "color of law" and "in good faith". It found there was substantial evidence of record to support a grant of authority for both general commodities and household goods.

Appellees Lynden Transfer, Inc. and North American Van Lines, Inc. protestants in the I.C.C. proceeding, filed an action in the United States District Court for the Western District of Washington, Northern Division, to set aside the Commission's order. They contended (1) that the Commission was without authority to reopen the proceedings for reconsideration

upon its own motion once the appellate division had upheld the Operating Rights Review Board, and (2) that, in any event, there was no substantial evidence to support the Commission's order.

The District Court referred to appellees" first argument as "prepotent", but found it unnecessary to resolve that issue since it concluded that there was no substantial evidence adduced at the hearing to support the finding that there was a need for the services of applicant which were here being challenged. (J.S. App A [c] & [d]) The court also held that appellant's evidence of his prior transportation of household goods was not entitled to consideration on the grounds that these services were unauthorized and in "wilful disregard of the law". (J.S. App A [d] & [e]) The court stated that the Commission pointed to appellant's filing of a "grandfather" petition in 1960 as conferring "color of law" on its household goods operation during its pendency and that "we fail to understand how the filing of a petition for authority, without more, can be said to supply the authority sought while the petition is pending". (J.S. App A [e] & [f]) The court further found that there was an "abrupt cessation" of non-household goods (general commodities) subsequent to early 1962. (J.S. App A [d]) It found that appellant's general commodity and household goods operations from 1951 through 1959 were of no probative value, but it did not find them unlawful. (J.S. App A [f]) It also found there was no need for appellant's household goods services as those of North American Van Lines, Inc. were adequate. (J.S. App A [f])

The court concluded "that the Operating Rights Review Board correctly determined that at the hearing applicant adduced no substantial evidence, as that phrase is interpreted by the U.S. Supreme Court in Consolo v. Federal Maritime Commission 383 US 607 (1966), of a need for any of its proposed services other than the transportation of non-household goods between Great Falls and Alaska". (J.S. App A [g])

The basic questions presented by the Jurisdictional Statement are whether the District Court properly interpreted and applied Consolo (Supra) in relation to the representative shipment exhibits and the comparative gross receipts exhibit; whether the District Court's application of Armored Carrier Corp. v. United States 260 F Supp 612 (E.D.N.Y. 1966) and Best Way Motor Freight, Inc. v. United States 253 F Supp 314, 319 (W.D. Wash. 1966) relative to unlawful operations was correct in view of appellant's pending "grandfather" application under the provisions of 206(a)(4), the Alaska "Grandfather" Amendment to the Interstate Commerce Act; whether finding no need for appellant's services due to its failure to show inadequacy of existing carriers' services was counter to the findings in Nashua Motor Express, Inc. v. United States, F Supp 646 (1964); and whether three shipper witnesses are adequate to support a grant of authority based on the criteria set by the Commission in Mayflower at 20 M.C.C. 633.

Appellant's "Argument" also includes collateral questions.

The position of appellant is that the "grandfather" proceeding, MC-118520 Sub 5, is so closely interwoven with the proceed-

ing at issue herein- MC-118520 Sub 3, that it must be considered at least to the extent it is reflected in this record to, arrive at a proper conclusion. A reading of the orders of the Examiner and of the full Commission show the pertinency of the "grandfather" aspects in their arriving at a favorable decision for appellant.

The District Court transcript does not contain a single reference to the "grandfather" aspects. This court, in its Opinion (J. S. App A [e]), refers once to the "grandfather" application when stating that it fails to understand how the filing of a petition for authority can be said to supply the authority sought while the petition is pending. It, therefore, found such operations "in wilful violation of the law". Yet this application was filed under the provisions of 206(a)(4), the Alaska "Grandfather" Amendment to the Act. It specifically states: ". . pending determination of such application the continuance of such operations without a certificate shall be lawful". It does not state the final determination must be favorable in order for such operations to be lawful. If this Court affirms the lower court, 206(a)(4), the Alaska "grandfather" Amendment to the Interstate Commerce Act is unconstitutional.

Collateral to this, the Commission in 1963 interpreted the "grandfather" amendment as disqualifying appellant's application. Had this interpretation been made at the time of its enactment in early 1960 the Commission would have as a matter of course set the instant application for a timely hearing in 1960 or 1961. In view of the growing operations as evidenced by the gross receipts exhibit, authority sought would have been granted without question.

Appellant contends that as a result of the Commission's failure to make a timely interpretation of the amendment and its postponing consideration of this application from 1959 until 1963, for its own administrative convenience until such time as there was a determination of the "grandfather" proceeding, he was denied "due process" since this hearing was not set for hearing regularly and in accordance with established rules and principles. Appellant pointed to these grave administrative errors and omissions in his petition to the full Commission for a finding of general transportation importance and in his motion for a new trial.

Appellant contends and the full Commission agrees that operations conducted during the pendency of the "grandfather" application were performed under "color of law" and "in good faith". The lower court bases its finding that these operations were "in wilful violation of the law" on Best Way and Armored Carrier (Supra). It is the contention of appellant that the District Court misinterpreted and misapplied these cases. In Best Way the court found that the probative value of evidence is not affected by the fact that the operation may have been unlawful and the need for such service is a fact even though operating authority was lacking and an invalid operation should not be rejected because it is insubstantial. In Armored Carrier the Court ruled on the question, which was not necessary in Best Way since it was found to operate under "color of law", that the argument that past wilful violations should bar grants of authority in the present and future is looking backward and appears transfixed; examination should assess the prospective conduct of

the applicant; such assessment is within the expertise of the Commission and shouldn't be interfered with unless arbitrary and capricious. The full Commission found appellant's operations to be in good faith and under "color of law". To support its findings it cites Washburn Storage Co. Extension-Household Goods, 29 M.C.C. 116 at 119. This case also had "grandfather" aspects and due to the fact that its gross revenues increased during its unauthorized operations, the Commission held that: "We have consistently held that long-continued successful operation is evidence of public convenience and necessity". Exhibit 7 shows appellant's gross revenues increased tremendously. These revenues accrued during the time of the so called unlawful operations and were performed under legally filed tariffs and tenders, approved by the Commission.

A reading of the transcript of the District Court proceeding shows that it was almost exclusively concerned with the "how" and "why" the full Commission reopened this proceeding on its own motion. Appellees contend and the court appears to concur that an appellate division decision is administratively final and the Commission was without authority to reopen this matter. In the Commission's General Rules of Practice under 101, there are provisions which set forth exceptions to the administrative finality of appellate division decisions. 101(a)(2) provides that an appellate division decision is not administratively final if it changes or modifies a prior decision of a hearing officer. 101(g) provides that an appellate division decision denying a petition seeking to change or modify an original determination by a board of employees is not subject to

review. However, the original determination in this matter was made by the hearing officer and was modified by the Review Board and Division 1. It is, therefore, appropriate for the full Commission to grant reconsideration.

The answer to the District Court's question as to "why" the full Commission reopened this matter seems obvious. After his petition for reconsideration was denied by Division 1, appellant filed a petition for a finding of general transportation importance with the full Commission. This petition was denied, but in the same order the full Commission reopened the matter for reconsideration on its own motion, apparently for the reasons contained in the petition.

The District Court's finding that no substantial evidence was adduced (J.S. App A [g]) assumed the representative shipment exhibits were the total traffic handled. It failed to compare the gross receipts exhibit with the representative shipment exhibits. Appellant has shown that by taking the total weight of an individual shipment exhibit times its average tariff rate the resultant revenue reflected is only 10% to 20% of the actual revenue shown on the comparative gross receipts exhibit. Applying Consolo (Supra), any reasonable mind would accept the foregoing as adequate to support a conclusion that these exhibits were merely representative and were substantial. Obviously, the District Court erred in substituting its judgment for that of the Commission in determining the substantiality of the evidence. Other Supreme Court decisions supporting the Commission's expert analysis of the evidence can be found in United States v. Detroit Navigation Co.,

326 U.S., 236 at 241 (1945) and Interstate Commerce Commission v. Parker, 326 U.S. 60.

The District Court's finding that there was an abrupt cessation of traffic (J.S. App A [d]) in 1962 is not supported by the record. The transcript of the Sub 3 proceeding shows that Douglas Lantz, President of Alaska Truck Transport, Inc., testified that it was holding out a general commodity service averaging one and a half to two trips weekly and that warehouse facilities were maintained in Seattle. This testimony and Exhibit 7, showing gross revenues at March 31, 1962 and March 31, 1963 refute the contention that there was an abrupt cessation. It is appellant's position that in view of being denied "due process" by the Commission for administrative purposes, the only evidence necessary to support this application should be that which would have been presented if this hearing had been timely held in 1960 or 1961. Operations since 1962 should have no bearing on this application.

The District Court points to the exclusion of household goods from the regular Temporary Authority, under Sec. 210 (a) of the Act, granted in 1959 and to the household goods operations during the pendency of the "grandfather" application as being "in wilful violation of the law".(J.S. App A [e]) It ignores the parallel situation relative to authority in that the enabling Act admitting Alaska to the union did not contain provision for instituting regulation of motor carriers in Alaska. Prior "grandfather" amendments to the Act in both 1935 and 1950 provide under 206 (b) an interim application stating that any carrier in operation on the date the sub-

paragraph takes effect and filing an application as provided therein may lawfully continue operations without a certificate until such time as a determination of that application shall be made by the Commission. It was assumed that the Alaska Grandfather Amendment would contain a like provision and thus legitimatize appellant's operations. Appellant was advised to continue his operation by the District Supervisor for the Interstate Commerce Commission. His affidavit verifying this is shown as Exhibit 10 in appellant's motion for a new trial. The District Court failed to recognize that our original Temporary Authority granted in January of 1959 included authority to originate household goods shipments in interstate commerce. Household goods could then be moved as an emigrant moveable authorized under general commodity authority.

The District Court notes that since appellant did not prove the inadequacy of the existing service of appellees that there was no need for his services. (J.S. App A [f]) This is contrary to the findings in Nashua (Supra) which states that while it is important to consider adequacy of existing service it is only one element and that other elements of equal importance are desirability of competition, desiribility of improved service and the desirability of a different kind of service. The full Commission noted in Alaska Truck Transport, Inc. 98 M.C.C. at 678 that appellant transported small general commodity and household shipments in specially equipped vans and that it does not appear that protestants herein are either authorized or inclined to undertake this method of transporta-

tion. Thus, the operations of Alaska Truck Transport would provide shippers with a "different kind of service".

The representative of North American Van Lines, as shown in the transcript of the Sub 3 hearing, testified that they do not provide direct highway service between Seattle and points in Alaska. The Commission found that appellant and North American had been in competition for all-highway traffic between Great Falls and Alaska for many years with no demonstrated ill effects to North American's operation. The grant of household goods authority was, therefore, correct.

Appellee, Lynden Transfer, Inc., points to the fact that in the same order deleting certain authorities as directed by the District Court decree, the Commission reopened this matter for further hearing on its own motion. Lynden contends that in view of this additional remedy consideration by this Court is unnecessary. However, in its brief to the Commission subsequent to the further hearing, North American specifically states that the Commission is without jurisdiction to set this matter for a further hearing and moves that it be dismissed. If it is not, appellees will request an additional injunction in the District Court. Even if a favorable order resulted from this so called additional remedy, if the Supreme Court grants the motion to affirm, in further litigation the position of the Commission and the appellant would be indefensible since the entire record of prior operations would have been declared unsubstantial, in wilful violation of the law and inadequate to support a grant of authority. The additional remedy would be a nullity.

ARGUMENT

THE QUESTIONS PRESENTED BY THIS APPEAL ARE SUBSTANTIAL

I.

AFFIRMING THE DISTRICT COURT DECISION WOULD BE FINDING THE ALASKA "GRANDFATHER" AMENDMENT, 206(a)(4)(5), PART II, OF THE INTERSTATE COMMERCE ACT UNCONSTITUTIONAL.

Appellant, pursuant to instructions from Mr. William F. Meehan, Jr., District Supervisor of the Commission for Alaska, filed an application for authority under the Alaska "grandfather" provisions contained in the amendments 206(a)(4) (5) to the Interstate Commerce Act on Dec. 29, 1960. On Jan. 17, 1961 the Commission wrote a letter stating:

"Your application seeking authority to continue operations as a motor common carrier, over irregular routes, under the applicable "grandfather" provisions of the Interstate Commerce Act, as amended, transporting:

General commodities, including household goods, as defined by the Commission, and excepting articles of unusual value, and Classes A and B explosives, (1)' between points in Alaska, on the one hand, and, on the other, points in Washington and Montana, and Portland, Oregon,

has been assigned Docket No. MC-118520 (Sub No. 5).

As you no doubt know, common carriers rates and charges should be on file for the above operation, as required by Section 217 of the Act. However, it appears that you are without rates for part of the operation. For example, it

does not appear that you maintain rates on general commodities between Portland, Oregon, and points in Alaska-"

(This letter, in its entirety, was Exhibit 9 in appellant's motion for new trial.) Appellant immediately complied with the requests of this letter.

The District Court, in its Opinion, (J.S. App A [e][f]) states:

"In separate proceedings in December of 1959 applicant was granted temporary authority to transport general commodities between Alaska and Seattle and Great Falls; but household goods were specifically excluded from that grant of authority. From that date forward, at least, applicant was fully aware that it was prohibited by law from transporting household goods between the continental United States and Alaska. We hold that applicant's shipments of household goods subsequent to that date were in wilful violation of the law and therefore are not admissible to show the need for the services provided.

The I.C.C., in reversing the order of the Operating Rights Review Board and again in this court, points out that in December of 1960 applicant filed a "grandfather petition" for authority to transport household goods. The I.C.C. contends that although this petition was eventually denied in 1963, shipments of household goods made during its pendency were made, "under color of law." We fail to understand how the filing of a petition for authority, without more, can be said to supply the authority sought while the petition is pending." (Emphasis supplied.)

The foregoing finding of the District Court is an error at law. Appellant's application for authority under the Alaska "Grandfather" Amendment was accepted in its entirety. The last paragraph of Section 206(a)(4), the Alaska "Grandfather" Amendment to the Act states:

". . . if application for such certificate is made to the Commission as provided herein or before December 31, 1960. Pending the determination of such application the continuance of such operations without a certificate shall be lawful." (Emphasis supplied)

It does not state that the final determination must be favorable in order for the operations to be considered lawful.

If this Court affirms the above find of the District Court that appellant's operations conducted during the pendency of its "grandfather" application were "in wilful violation of the law", then it will be finding Section 206(a)(4); Part II, of the Interstate Commerce Act to be unconstitutional.

II

THE COMMISSION SHOULD HAVE INTERPRETED THE CERTIFICATE REQUIREMENTS OF THE "GRANDFATHER" AMENDMENT, 206(a)(4), AS DISQUALIFYING APPLICANT AT TIME OF ENACTMENT IN MID 1960, OR AT LATEST, AT TIME OF FILING OF THE APPLICATION

Appellant, at time of filing its "grandfather" application, felt assured that its many years of "color of right" operations and the fact that it held a regular Temporary Authority, approximately covering the scope of its application, met the certificate requirements of

206(a)(4). This assurance was reinforced by opinions expressed by Commission personnel. Until the Examiner's order in mid 1963, it had no inkling that the "grandfather" amendment would be interpreted in a manner disqualifying applicant. The Commission, for its own administrative convenience, indefinitely extended applicant's regular temporary authority, granted in September of 1959. It decided that no carrier's permanent authority application would be heard until after its pending "grandfather" application had been determined. Appellant's permanent authority application, MC-118520 Sub No. 3, was filed in August of 1959. Appellant is not implying that there was any intent on the Commission's part to injure him. His was the only small Alaska carrier having a basis for a relatively broad grant of authority. Others affected by this decision were applying for limited specialized authority and were not opposed as in the case of Alaska TruckTransport, Inc. by the major carriers with unlimited financial ability to fight the grant of authority. Had the Commission disqualified the application in 1960 or early 1961 and set the Sub 3 application for hearing immediately, the scope of its growing operations as evidenced by Exhibit 7 would have without question resulted in the issuance of a permanent certificate, thus enabling us to meet the fast changing competitive situation in the Alaska transportation picture. Exhibit 7, comparative gross receipts, shows annual revenues at March 31, the end of each fiscal year as follows: 1959, $35,000; 1960, $248,000; 1961, $418,000; 1962, $474,000; and 1963, $367,000. The insecurity of the continued reversals relating to its authority has had a tremen-

dous and almost irre parable financial impact upon appellant. Without the security of such a permanent authority, it could not risk additional investment and expansion necessary for its financial well being.

Appellant was denied "due process" because of an improper interpretation and application of 206(a)(4), the Alaska "Grandfather" Amendment, and as a collateral and subsidiary result, the Commission's failure to set for timely hearing appellant's application, MC-118520 Sub 3.

Appellee contends that our reference to the "Grandfather" proceeding is improper and should not be considered by the Court. The "grandfather" proceeding is a collateral matter in that it shows our operations were under "color of law" during the pendency of the application and, further, that as a result of the pendency of "grandfather" legislation and the pendency of the application, our permanent authority application (Sub 3) filed in August of 1959 was not heard until August of 1963. This was an administrative decision of the Commission.

To further demonstrate this point, while the Sub 3 hearing was held in August of 1963, in June of 1964 the Examiner's report and order had not yet been issued. At that time appellant wrote Chief Examiner Cheseldine requesting information as to why the order had not been issued. By return mail he advised that due to the pendency of our petition for reconsideration to Division 1 of the denial, for certain technical deficiencies, by the Examiner and the Review Board of the Sub 5 ("grandfather") application, he could not issue an order on the Sub 3 application. After denial of this petition by Division 1, he promptly issued a favorable order in the Sub 3 proceeding.

This was five years after the application had been filed.

Appellant contends that as a result he was denied "due process of law". It was not set for hearing regularly and in accordance with established rules and principles. Had the Commission interpreted the "grandfather" amendment to the Act at the time of its enactment in early 1960 as disqualifying appellant, it would have set the Sub 3 application for immediate hearing. In view of our rapidly growing operations, as shown by Exhibit 7, the authority would then have undoubtedly been granted. Both our petition for a finding of general transportation importance and our motion for a new trial pointed to these grave administrative errors and omissions.

It is appellant's position that in view of its being denied "due process", by the Commission, for purposes administratively connected with the "grandfather" amendment, that the only evidence of record to be applied in support of this application for permanent authority should be that which would have been presented if this hearing had been timely held. This should have been in 1960, or at the latest, 1961. Appellant contends that operations since 1962 should have no bearing on this application. The Commission was, in effect, estopped from requiring such evidence in considering this application. In spite of the fact that we did not submit representative shipment lists for 1962 and part of 1963, the record shows in Exhibit 7 that in the year prior to March 31, 1962 there were gross revenues of $474,000 and at March 31, 1963, $367,000. This certainly does not indicate the "abrupt cessation" of

operations shown in the District Court Opinion (J.S. App A [d]).

III

SERVICES FOUND UNLAWFUL WERE PERFORMED UNDER LEGALLY FILED TARIFFS AND TENDERS WITH FULL KNOWLEDGE AND CONDONENCE OF THE COMMISSION

The District Court states (J.S. App A [d][e]):

> "The exhibits do show a substantial and increasing volume of shipments of household goods by applicant. Such shipments however, were made by applicant without authority and were therefore unlawful. The illegality of past operations does not, ipso facto, disqualify an applicant attempting to gain such authority. Armored Carrier Corporation v. United States, 260 F. Supp 612 (E.D.N.Y. 1966). In fact, there is authority for the position that where unauthorized operations are carried on "under color of law", a record of those operations may constitute evidence of a need for the services provided. Best Way Motor Freight, Inc. v. United States, 253 F. Supp 314, 319 (W.D. Wash. 1966) and cases cited therein. However, where those operations are carried on in wilful disregard of the law, they may not be used as evidence for this purpose. We cannot allow a carrier to better his position by electing to flout the law rather than to obey it. Such is the situation in the case at bar."

Appellant vigorously denies that it wilfully flouted the law. The full Commission found that our operations were performed in "good faith" and under "color of right" and "color of law". Even if our

operations were to be considered technically unlawful, the District Court grossly misinterprets and misapplies the cases cited, Armored Carrier and Best Way. (Supra) Best Way states:

". . . the probative value of evidence pertaining to a particular operation, in determining an issue of public convenience and necessity, is not affected by the fact that the operation may have been unlawful. If such an operation demonstrates a need for such a service, the need is nonetheless because of the fact, if it is a fact, that operating authority was lacking. Thus evidence pertaining to an invalid operation ought not to be rejected because it is "insubstantial." (Emphasis supplied.)

The Court also stated, at 319:

"In support of its contention that the evidence pertaining to the Okanogan second-proviso operation should not be deemed substantial, plaintiffs cite Commission decisions in which no weight was accorded evidence of unlawful operations. Vance Trucking Co., Inc., --Purchase--Northern Neck Transfer, Inc., 87 M.C.C. 545; Palmer Lines, Inc. --Control and Merger, 87 M.C.C. 160; Worster--Control--McKay and MacLeod Corp., 87 M.C.C. 679."

"But Commission authority can also be found which supports the contrary view that unlawful operations, conducted under color of law, are entitled to consideration in determining whether public convenience and necessity warrants the proposed service. Bowman Transportation Inc., Extension--Five Point Authority, 92 M.C.C. 651; Michigan Express, Inc.--Purchase--Williams, 45 M.C.C. 211; Hoover Motor Express Co., Inc., Exten-

sion--Intermediate Points, 42 M.C.C. 315; Royal Cadillac Service, Inc., Common Carrier Application, 34 M.C.C. 787; D.A. Beard Truck Lines, Co., Common Carrier Application--New Operation, 34 M.C.C. 395. The Commission has chosen to rely upon this second line of authority.

In Armored Carrier the Court ruled on the question which it was not necessary for this Court to decide in Best Way and found: ". . . that past wilful misconduct is not, as a matter of law, sufficient to bar a grant of authority". In sustaining the Commission's grant of a certificate of public convenience and necessity under Section 207(a), the Court further noted:

> "The argument that past wilful violations should, per se, bar grant of authority in the present and for the future is one that looks backwards and appears transfixed. Examination of the past should only be useful in assessing the prospective conduct of the applicant. Such assessment is one peculiarly within the expertise of the I.C.C. and should not be interfered with unless found to be arbitrary and capricious."

(Emphasis supplied.) Consequently, if past wilful misconduct does not, per se, bar a grant of a certificate of public convenience and necessity, then a fortiori, the Commission, which in its report on reconsideration in the instant case, 99 M.C.C. 668, 676-77, found that Alaska Truck Transport's household goods operations between Dec. 29, 1960 and the time of the hearing were conducted under color of right and that its operations before Dec. 29, 1960, were unauthorized merely because of ". . an oversight on applicant's part in not obtaining the requisite authority to support its grandfather

filing," clearly acted within its proper discretion in considering these operations as evidence, in part, of the public need for Alaska Truck Transport's proposed household goods services.

To further support that operations were conducted "in good faith" prior to Dec. 29, 1960, its president, Douglas Lantz, testified at the hearing that in 1951 he was advised by the offices of the Commission in Seattle that he needed no authority to operate between points in the continental United States and points in Alaska (Tr. 38-39). Mr. Lantz testified further that it was not until the fall of 1958--when a Commission representative arrived in Alaska subsequent to passage of the Alaska statehood bill--that he was aware of the need for authority from the Commission to operate between the continental United States and points in Alaska. Thereafter, he filed his application for temporary authority. (Tr. 37-39). On cross-examination, none of the protestants challenged the above testimony of Mr. Lantz. (Tr. 103-116). Also, Alaska Truck Transport stated in its answer to Lynden's petition for reconsideration, filed Nov. 26, 1964 (p. 4):

> "The record will show that applicant's president stated under oath that he did not know operating authority was required in the years prior to statehood and the arrival of Mr. Meehan as District Supervisor, he learned that authority was required. He immediately filed his Tariff No. 1 and, a few days after statehood in January, filed an application for Temporary Authority under MC-118520 Sub 2 TA.

It is of significance that in the "grandfather" proceeding, Alaska Truck Transport,

Inc., "Grandfather" Application, 92 M.C.C. 787, the Commission stated that (at 789):

> "Until 1959, applicant's president and applicant, were unaware that the operations to and from Seattle, Portland, and Great Falls (to and from points in Alaska) required authority from this Commission."

In its report on reconsideration (99 M.C.C. 668, at 677), the Commission concluded:

> "We discern nothing in this record to indicate any more than an oversight on applicant's part in not obtaining the requisite authority to support its grandfather filing. Absent this oversight, it might well have avoided the denial of the portion of its "grandfather" application, which in effect it seeks to remedy here."

In addition, in Best Way (Supra) this Court went on to state (at 319):

> "We need not decide whether the Commission may, or must, as a sort of penalty, reject evidence pertaining to an illegal operation where such operation was not conducted under color of law or was associated with fraud or concealment; or, conversely, whether, given an operation conducted under color of law, bad faith is immaterial, as was held in Bowman. As before stated, Okanogan operated under color of law, and no bad faith was shown."

The Commission's brief in the lower court, pages 36-46, more thoroughly and competently discusses the foregoing portion of this argument.

There is, however, one aspect overlooked by the Commission and the court. Legal tariffs and tenders were on file with the Commission covering the scope of operations purportedly performed unlawfully. In our motion for new trial Exhibits 2, 3, 4, 5 and 6 show participation in 1959 in tariffs of

the Movers' and Warehousemen's Association of America, Inc., a tariff agency for household goods carriers only. Its Tariff No. 3-G, MF-I.C.C. No. 38, Participating Carrier and Scope Tariff, effective April 1, 1960, shows Alaska Truck Transport, Inc. as a participant on its page 8. It further shows participation in Tariff No. 20, MF-I.C.C. No. 36, naming joint rates on household goods between points within the United States. It was necessary to participate in this tariff because we were interlining in Seattle or Great Falls with carriers serving the other states. In order to participate in any tariff a carrier must have Commission approval before publication.

At least 80% of all household shipments serviced by appellant were for the military and moved under Government Bills of Lading. In order to participate in Department of Defense household movements, a carrier must be a party to military rate tenders covering a scope from origin to destination. Participation in military rate tenders must also be filed with and approved by the Commission. Military Rate Tender, I.C.C. No. 7, Supplement No. 6, effective Oct. 19, 1960, naming rates on shipments of household goods between points in the United States and points in Alaska, shows the participation of Alaska Truck Transport, Inc. It also shows that our participation is a revision of a reissue from the Supplement No. 5, effective early in 1960. Military Rate Tender No. 1, Supplement No. 15, effective Aug. 10, 1960, naming rates on household goods between points within the United States also shows our participation. This participation has been continuous. While this record does not reflect our participation

in these tariffs and military rate tenders, they are a matter of public record. Unless we had been a party to these tariffs and rate tenders, the Government would not have approved our participation in military household traffic or issued Government Bills of Lading in our name. The representative shipment lists, which were supported by underlying documents, prove that at least 80% of the household traffic transported was military and moved under Government Bills of Lading showing the appellant as the carrier. This is supported by the record. In view of the foregoing evidence of "color of law" and "good faith" operations no jury would find us guilty of wilfully flouting the law.

IV

THE DISTRICT COURT ERRED IN IGNORING THE "GRANDFATHER" ASPECTS RECOGNIZED BY THE FULL COMMISSION AND THE EXAMINER

The forty five page District Court transcript does not contain the words "Alaska Grandfather" one time. Practically the entire transcript consists of questions and discussions by the Court and counsel as to how and why this "run of the mill" case was reopened by the full Commission.

The transcript, at P. 18, L. 23-25 and P. 19, L. 1-19 shows:

"JUDGE BEEKS: Somewhat corollary to Judge Hamley's question here is a matter that occurred to me and that I have been thinking about. I suppose that if a matter is before the Commission, though, this is a rather inconsequential run-of-the-mine case and I was wondering what there was, if you

know, that prompted the Commission to intercede sua sponte after it had been finally determined by an appellate division.

MR. SMITH: Judge Beeks, I have no knowledge of any reason. It is -- in response, if I may say, I will agree with you it is a run-of-the-mill in that 207 is one of the most common type of case for application of public convenience and necessity to come before the Commission.

JUDGE BEEKS: Isn't this a very unusual procedure so far as the Commission is concerned - opening it up sua sponte?

MR. SMITH: Your Honor, I would not characterize it in that manner. I don't know specifically how often the Commission has done so but this gets to the basis of our point. I will agree that normally the Commission would not ordinarily reopen the matter."

The transcript at P. 22, L. 19-25 and P. 23, L. 1-9 shows:

"MR. SMITH: I think the crux of the decision, your Honor, is that the entire Commission disagreed with the operating rights towards interpretation of the unauthorized operation, or the operation conducted without any authority. That, I think, is the basis of the Commission's reopening, that it appears in the final report, because that was the basis, the base, of the Commission's grant of authority, both the household goods and the general commodities, and the Commission, the entire Commission, disagreed with the operating rights.

JUDGE HAMLEY: If we should give you, say, ten days could you supply any citations of cases, other cases, in which the Commission has done substantially

this - that is, reopen for reconsideration of an appellate division decision without making a finding of general transportation importance?"

(Cases were subsequently supplied by Mr. Smith, Commission counsel.) The transcript P. 30, L. 15-25 and P. 31, L. 1 and L. 6-8 shows:

"MR. SMITH: Well, your Honor, may I answer that by referring to Rule 102, which is a - - the Commission has a rule that provides that if there is no other rule that covers the situation a party can file a petition under Rule 102.

Now, I think, in answer to your question, it would seem to me that this Rule 102, which the Commission has characterized as for extraordinary relief, if I may assume, even though it is not present in this case, some unusual factor were present, the entire Commission felt he could entertain a petition under Rule 102, and that would run counter to the reasoning of Transamerican.

JUDGE HAMLEY: (Interposing) There is nothing in this record of anything extraordinary, is there?

MR. SMITH: No--your Honor. I would agree."

The transcript, P. 42, L. 2-7, shows:

"JUDGE BEEKS: Can you throw any light on how this case happened to be reopened?

MR. JOHNSON: Oh, it would be purely conjecture, your Honor.

JUDGE BEEKS: All right, I guess we can do that too."

The purpose of the foregoing quotations from the record is to show that the Court's interest was directed primarily towards questioning the authority of the Commission

to reopen a matter on its own motion that had been decided by an appellate division and the reasons for so doing. With the exception of pages 35 through 40, which discuss evidence supporting general commodity and household goods grants, the entire transcript is devoted to questioning the Commission's authority in reversing an appellate division decision.

Appellant will not attempt to quote law to support the Commission's continuing jurisdiction of its orders and decisions. This has been very ably done in the Commission's brief, pages 19 through 35. Appellant will, as a layman, interpret Rule 101 of the General Rules of Practice as he sees it. Appellant will also point to the logical reasons for the full Commission's reopening on its own motion.

After oral hearings in August of 1963 before Chief Examiner Cheseldine, a report and order was served in the summer of 1964 which was substantially identical to the findings of the full Commission on reconsideration. This hearing officer's finding was the original determination. The Review Board subsequently modified the original determination of the hearing officer. Applicant-appellant then petitioned Division 1 for reconsideration. The petition was denied. Applicant then filed a petition for a finding of general transportation importance under Rule 101. Applicant's basis for filing this petition under Rule 101(a)(4) and his belief in the rightness of the Commission's reopening this matter on its own motion, even though denying the petition in the same order, will be supported by his analysis of this Rule and the circumstances of this particular case.

Rule 101(g) is apparently the basis for

protestant-appellee's contention that the Commission had no authority to reopen this matter for further hearing. This Rule states: "Petitions for reconsideration of appellate division decisions on review of board decisions: When an appellate division has denied a petition seeking a reversal, change, or modification of an original determination by a board of employees, any further petition for reconsideration by the same party or parties upon substantially the same grounds will not be entertained." (Emphasis supplied.)

Rule 101(g) does not apply under the particular circumstances of this case. The original determination was made by a hearing officer rather than a board of employees. Division 1, acting as an appellate division, merely denied our petition for reconsideration of the Review Board's modification of the original determination of the hearing officer.

There is another portion of the Rule, 101(a)(2), that further supports the rightness of the full Commission's action in the particular circumstances of this case. Rule 101(a)(2) states:"Administrative finality of division decisions" All decisions, orders, or requirements of a division of the Commission in any proceeding shall be considered administratively final, except those involving issues of general transportation importance, those wherein the division reverses, changes, or modifies a prior decision by a hearing officer . . " Obviously, the denial of Division 1 of the petition for reconsideration resulted in the modification of the hearing officer's original determination.

From the foregoing, it is readily apparent that the Rules do not prohibit the

full Commission from reopening this matter for reconsideration on its own motion as claimed by plaintiffs in the lower court and, seemingly, by the lower court.

Appellant will apply the rule of reason and the law of cause and effect to show the apparent reason the Commission reopened this matter on its own motion.

After the denial of the petition for reconsideration by Division 1, appellant, in his analysis of Rule 101, felt that he could again petition Division 1 for reconsideration, but in view of its prior denial felt it would be a waste of time. His only alternative, other than a lengthy and expensive court proceeding, was to file a petition for a finding of general transportation importance, thus bringing to the attention of the full Commission his plight. Therefore, on April 5, 1965, under Rule 101(a)(4), such a petition was filed. This petition set forth the reasons we felt we had been unjustly treated. Those reasons were:

"1. Petitioner has been operating under color of right, various temporary authorities and grandfather applications covering both general commodities and household goods for fifteen years.

2. Is it just and equitable for the Commission to indefinitely extend for its own convenience a regular TA, encouraging and allowing petitioner to invest almost $500,000, and then, after six years operations under this TA, deny that portion of the authority representing 85% of the volume of his business and, in effect, destroy him?

3. The Review Board erred in stating that household goods operations were not conducted under color of right (pgs. 11, 12,13 and 14; order dated Dec. 8, 1964).

4. Congress when drafting grandfather legislation specifically directed that there should be a liberal treatment of the grandfather applicants. See Al Renk & Sons, Inc., 89 M.C.C. 91, and Herda Alaska Truck Lines, Inc., MC-113573, Sub 5, 98 M.C.C. Should not this liberality be extended petitioner with his admitted color of right operation for fifteen years?"

At a general session of the Interstate Commerce Commission held at its office in Washington, D.C., on the 12th day of May, 1965 an order was issued and, in its first ordering paragraph, stated: "It is ordered, That the said petition be, and it is hereby, denied, for the reason that in the judgment of the Commission, no issue of general transportation importance is involved;" and, in its second ordering paragraph, stated: "It is further ordered, That the said proceeding, on the Commission's own motion, be, and it is hereby, reopened for reconsideration on the present record."

By applying the law of cause and effect and logic, it seems obvious that while the Commission did not feel our case was a matter of general transportation importance one or more of the issues awakened it to the injustice committed. There was absolutely no action by any party other than this petition that could have caused the Commission, in the same order denying the petition to reopen this matter on its own motion.

The petition points to the "grandfather" aspects of appellant's position and his many years of operations under color of right and color of law. It also mentions the Congressional intent specifically directing that there should be liberal treat-

ment of "grandfather" applicants.

Sept. 23, 1965 the full Commission issued an order granting authority substantially identical to that recommended by Chief Examiner Cheseldine. Supporting the fact that consideration was given the "grandfather" aspects of this proceeding is shown in Alaska Truck Transport, Inc., Extension-Alaska 99 M.C.C. 668 at 677 stating: "In certain cases the clear contumacy of the applicant's unauthorized operations may indicate that it is not sufficiently amenable to regulation to justify our confidence in its probity in the future. Thus, at times we may have no alternative to a denial of authority on account of past unauthorized operations. But this is not the case here. We discern nothing in this record to indicate any more than an oversight on applicant's part in not obtaining the requisite authority to support its grandfather filing. Absent this oversight, it might well have avoided the denial of the portion of its "grandfather application, which in effect it seeks to remedy here. In the circumstances we are not prepared to discard applicant's evidence of its past transportation of household goods in seeking to ascertain whether need exists for the proposed service. This evidence is highly competent with respect to this issue. Washburn Storage Co. Extension-Household Goods, 29 M.C.C. 116. We will, therefore, give it full consideration." (Emphasis supplied.)

In Washburn, a case also having "grandfather" aspects, the Commission found that (at 119): "Since 1939 applicant has been conducting nonradial service in what, for the most part, was later found to be territory for which it had "grandfather"

rights. This service was rendered until Oct. 9, 1940, and though unauthorized, it was conducted in good faith under the mistaken belief that it was within the scope of the "grandfather" rights."

In continuing, the Commission stated: "Without doubt, the service has been successful, and the fact that the gross revenues therefrom increased from about $3,000 in 1986 to $20,000 through September 1940 bears out applicant's testimony that the volume of shipments has been increasing. This indicates that the operation has served a public need. We have consistently held that long-continued successful operation is evidence of public convenience and necessity. (Emphasis supplied.)

Appellant's revenues increased from $35,000 in March of 1959 to $367,000 in 1963. (See Exhibit 7.)

Chief Examiner Cheseldine, in his favorable order dated June 3, 1964, refers extensively to the "grandfather" aspects of this case. (P 2, para 5; P 3, para 2 and 4; and P 7, para 5.)

It is obvious from the record that the District Court gave no consideration to the "grandfather" aspects of this proceeding.

V.

THE DISTRICT COURT ERRED IN SUBSTITUTING ITS JUDGMENT FOR THAT OF THE COMMISSION IN FINDING APPLICANT ADDUCED NO SUBSTANTIAL EVIDENCE TO SUPPORT THE NEED FOR ITS SERVICE

The District Court stated (J.S. App A [d]):

". . On the state of the record before us, however, we need not reach that

question, for we conclude that there was no substantial evidence adduced at the hearing to support the finding that there was a need for the services of applicant which are here being challenged. A review of the relevant evidence is therefore indicated."

Applicant relies heavily upon four exhibits offered into evidence at the hearing which constituted a record of applicant's operations between Alaska and the Continental United States in the period of 1956-1963."

The District Court is erroneously assuming that Exhibits numbered 2,3,4, and 5 show the total traffic transported by appellant between continental United States and Alaska. Each of these exhibits is headed with the words "Representative Shipments". Webster defines "representative" as: "1. a typical example of a group, class, or quality; specimen; 2. one that represents another or others." These exhibits show "representative" shipments. As a result of Examiner Cheseldine's stating just prior to the opening of the Sub 3 proceeding that he would consider the record of the "grandfather" proceeding our attorney, Mr. George LaBissoniere, did not attempt to bring out testimony relative to the percentage of the total volume of traffic the representative shipment exhibits reflected. Exhibits 2,3, and 4 in this proceeding were originally exhibits 4,5,and 6 in the "grandfather" Sub 5 proceeding. In the "grandfather" proceeding, applicant's president testified that these representative shipment exhibits reflected, depending on commodity, from one to twenty per cent of the total traffic handled. We were recently made aware that the testimony relative to these

representative shipment exhibits was not a part of the record considered by the Review Board, Division 1 and the District Court. We had always assumed that since Chief Examiner Cheseldine had stated off the record that he intended to consider the record of the "grandfather" proceeding in conjunction with the Sub 3 proceeding, the Review Board, Division 1 and the District Court had available the "grandfather" record to consider as a part of this record. It was with surprise that appellant noted on P. 2 of the certification of the Clerk of the U.S. District Court of the record on appeal that the parts of the I.C.C. record in MC-118520 Sub 5, the "grandfather" proceeding, as listed in Item No. 1 in appellant's designation, was not a part of the record on appeal. If it was not a part of this record on appeal, then it was not considered by the Review Board and Division 1. It is difficult to assess the value of representative shipment exhibits without considering the testimony relevant to them at their introduction. For reasons already stated relevant testimony was not repeated in this proceeding. Despite this omission, we will prove conclusively to any reasonable mind from the evidence in the present record that these representative shipment exhibits reflected approximately 20% of the total traffic handled. Immediately after the opening of this proceeding, exhibits were introduced and the following testimony adduced: (Trs. P 12, L 19-25)

"BY MR. LaBISSONIERE: Q. Now, Mr. Lantz, showing you Exhibits 2, 3, 4, and 5, which are purported to be an abstract of shipments for the period

" shown, I will ask you, sir, whether or not the abstract shown on Exhibits 2,3,4, are the identical ones you put in your Grandfather proceeding?

A. Yes, that is correct."

In the interests of brevity, we will analyze one of the representative shipment exhibits. We have chosen Exhibit 4, calendar year 1961, since it shows the greatest volume. To simplify computation we are rounding both dollar and weight figures. By simple addition of the weights shown for the various general commodity shipments, we arrive at a total of 800,000 pounds. (Commission brief P 68 shows 796,185 pounds.) Addition of the weights of the representative household shipments (excluding baggage, which moves as a general commodity) shows a total of 130,000 pounds. Our Alaska Truck Transport, Inc. Freight Tariff No. 2, MF-I.C.C. No. 2, originally effective Dec. 15, 1959, covers general commodities between points in Alaska and Seattle, Wash. and Great Falls, Montana. On first revised page 17, effective Dec. 28, 1960, under Item No. 360 is shown: Freight, all kinds, a maximum LTL (less than truckload) rate of $10.00 per hundred pounds. It shows a truckload minimum rate of $8.00 per hundred weight. For purposes of this analysis, we will assign a mean rate of $9.00 per hundred pounds. Taking the total weight of the general commodity shipments shown in Exhibit 4 of 800,000 pounds and multiplying it be the mean tariff rate of $9.00 per hundred pounds, we arrive at a total general commodity revenue of $72,000. As stated previously at least 80% of the household traffic handled was for the military. We will, therefore, use the military rate tender as the basis for rates in this analysis. Military Rate Tender,

I.C.C. No. 7, Supp. No. 6, effective Oct. 19, 1960, names specific household goods rates between Seattle, Wash. and points in Alaska. On page 2, Alaska Truck Transport, Inc. is shown as a participating carrier. Page 11, Sec. 5 shows the rate from Seattle to Anchorage, Alaska to be $16.10 per hundred pounds. It shows the rate from Seattle to Fairbanks, Alaska to be $18.10 CWT. Military Rate Tender No. 7, page 2, shows the option for alternate routing by highway so Great Falls, Montana has the same rate as Seattle, Wash. 90% of all household traffic moves to or from Anchorage or Fairbanks and Seattle or Great Falls. For the purposes of this analysis, we will, therefore, assign a mean rate of $17.00 per hundred weight. On household goods shipments there is also an accessorial charge for packing and/or unpacking. On shipments from Alaska to the other states we receive 80% of the accessorial charges. On shipments to Alaska we receive 20% of the origin accessorial charges for unpacking. This is industry standard. In 1961 the military rate tender was amended to provide for a flat $5.75 CWT to be added to the transportation rate from Alaska for accessorial charges. Although we received only 80% of this, we will, for this analysis assign $5.00 CWT to be added to the mean rate of $17.00 CWT for transportation, for a total of $22.00 CWT. Multiplying the 130,000 pounds of household goods shown on Exhibit 4 by the $22.00 CWT, we show $28,600 revenue on the representative household shipments. Adding the general commodity revenue shown of $72,000 and the household revenue of $28,600 we would have a total revenue of $100,600 generated from the traffic shown on

Exhibit 4. Exhibit 7 in this proceeding shows comparative gross revenues by year. These figures are based upon a fiscal year ending March 31. Since Exhibit 4 is for the calendar year of 1961, the first three months would fall in fiscal 1960 and the last nine months in fiscal 1961. Exhibit 7 shows our gross receipts at the end of fiscal 1960 to be $418,000 and at the end of fiscal 1961 to be $474,000. Again, we will take an average and show calendar 1961 to have gross revenue of $450,000 since our business was increasing during this period. We now compare the $100,000 generated by the representative shipments listed on Exhibit 4 to the $450,000 actual revenue as supported by Exhibit 7. This proves beyond a reasonable doubt that the shipments shown on Exhibit 4 were representative of approximately 22% of the total traffic handled. A similar analysis of Exhibit 3 for 1960 would prove to be even more conclusive in that it would show that it represented only about 10% of the total traffic moved.

We will make one more comparison of Exhibit 4 with Exhibit 7. We have already shown that Exhibit 4 shows 800,000 pounds of general commodity traffic and 130,000 pounds of household traffic for a total weight of 930,000. Exhibit 7 shows gross revenue of $474,000. By dividing 930,000 pounds into the gross revenue, we arrive at an average rate of $50.00 CWT (rounded) or .50 per pound! The air freight rate from Seattle to Anchorage is .135 per pound. Can any reasonable mind believe that the truck rate would be approximately four times that of the air rate?

Exhibit 5 shows representative household goods shipments from January of 1962 through June of 1963. The total weight is

164,000 pounds. Multiplying this by the $22.00 CWT shown above we arrive at a total of $36,800 (rounded) in household goods revenue. Exhibit 7 shows gross revenue for this one and a half year period to be approximately $600,000. It is apparent that a tremendous volume of traffic in addition to that shown in Exhibit 5 must have been transported to generate this revenue. The purpose of preparing Exhibit 5 is shown in the Sub 3 hearing transcript, P 106, L 5-20:

"Q. (by Mr. Johnson) Exhibit 5 is the only shipping list that was presented in this proceeding that wash't presented on the abstract of shipments that was presented in this proceeding that wasn't in your Grandfather proceedings, is that right?

A. (by Mr. Lantz) Well--may I explain why?

Mr. LaBissoniere: Well, ask him why.

Q. (by Mr. Johnson) Oh, all right, if you got an explanation.

A. (by Mr. Lantz) Primarily because the gentleman from North American wasn't here at the prior hearing and not having an opportunity to examine the bills, the underlying documents in the Grandfather application, to simplify the proceedings for him and shorten it, I made up this list and underlying documents solely for his benefit."

This transcript, P 13, L 1-7) shows:

"Q. (by Mr. LaBissoniere) Exhibit 5, is that self-explanatory?

A. Yes, that is an additional document--we did not have--.

Q. Do you have the freight bills, the underlying documents here in the hearing room?

A. Yes, sir.
Q. Those are just for household goods?
A. Yes."

As shown in the transcript, North American Van Lines, Inc. did not participate as a protestant a year earlier in the "grandfather" hearing. Because of this, Mr. Maxfield, North American's counsel, had not had an opportunity to examine the very extensive underlying documents supporting the household goods shipments shown on Exhibit 4. For this reason we prepared a very sketchy exhibit of recent household movements, with underlying documents for his benefit. We had already been advised prior to the hearing by Chief Examiner Cheseldine that since the underlying documents for representative shipment exhibits 2,3, and 4 had been examined by counsel for the same protestants in the earlier proceeding, we need not undertake the burdensome task of removing these documents from our files and again presenting them in the hearing room.

Decisions supporting the Commission's expert analysis of the evidence can be found in United States v. Detroit Navigation Co., 326 U.S. 236 (1945) in which the Supreme Court further emphasized the broad and exclusive discretion entrusted to the Commission in a proceeding concerning public convenience and necessity. The Supreme Court, at P 241, stated:

"The Commission is the guardian of the public interest in determining whether certificates of public convenience and necessity shall be granted. For the performance of that function the Commission has been entrusted with a wide range of discretionary authority. Interstate Commerce Commission v. Parker, 326 U.S. 60. Its function is not only to

appraise the facts and to draw inferences from them but also to bring to bear upon the problem an expert judgment to determine from its analysis of the total situation on which side of the controversy the public interest lies."

As recently as March 22, 1967 the Supreme Court reemphasized just how narrow is the scope of the standard of review of agency action. In Consolo v. Federal Maritime Commission, 383 U.S. 607, 619-621, the Court, in an opinion by Mr. Justice White, stated:

" Section 10(e) of the Administrative Procedure Act (5USC-1009(e) (1964 ed)) gives a reviewing court authority to "set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, [or] an abuse of discretion . . [or] (5) unsupported by substantial evidence . . . " Cf. United States v. Interstate Commerce Commission, 198 F2d 958, 963, 964, cert denied, 344 US 893, 97 L ed 691, 73 S Ct 212. We have defined "substantial evidence" as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Consolidated Edison Co. v. Labor Board, 305 US 197, 229, 83 L ed 126, 140, 59 S Ct 206. "It must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury. "Labor Board v. Columbian Enameling & Stamping Co., 306 US 292, 300, 83 L ed 660, 665, 59 S Ct 501. This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being

supported by substantial evidence. Labor Board v. Nevada Consolidated Copper Corp. 316 US 105, 106, 86 L ed 1305, 1306, 62 S Ct 960; Keele Hair & Scalp Specialists, Inc. v. FTC, 275 F2d 18, 21.

Congress was very deliverate in adopting this standard of review. It frees the reviewing courts of the time-consuming and difficult task of weighing the evidence, it gives proper respect to the expertise of the administrative tribunal and it helps promote the uniform application of the statute. These policies are particularly important when a court is asked to review an agency's fashioning of discretionary relief. In this area agency determinations frequently rest upon a complex and hard to review mix of considerations. By giving the agency discretionary power to fashion remedies, Congress places a premium upon agency expertise, and, for the sake of uniformity, it's usually better to minimize the opportunity for reviewing courts to substitute their discretion for that of the agency. These policies would be damaged by the standard of review articulated by the court below."

Obviously, the District Court erred in substituting its judgment for that of the Commission in finding applicant adduced no substantial evidence of general commodity and household goods traffic to support the need for its service.

VI

THE DISTRICT COURT ERRED IN FINDING THAT THERE WAS AN ABRUPT CESSATION OF TRAFFIC IN 1962

The District Court stated (J.S. App A [d]):

"Applicant relies heavily upon four exhibits offered into evidence at the hearing which constituted a record of applicant's operations between Alaska and the Continental United States in the period of 1956-1963. Plaintiffs aptly point out, and the Government concedes, that the latest shipment of non-household goods between Seattle and Alaska shown in those records occurred in January of 1962. Testimony at the hearing by applicant's president indicates that this abrupt cessation of this portion of their shipping business resulted, at least in part, from the award of a mail contract to an authorized carrier, and the improvement in the other carrier's services which that award made possible. The records, therefore, at best offer no evidence in support of the need for an authorization to applicant to transport non-household goods between Seattle and Alaska."

This is at variance with the testimony of Douglas Lantz, President of Alaska Truck Transport, Inc. as shown in the Sub 3 transcript, P 16, L 5-16:

"Q. (by Mr. LaBissoniere) I see. Now, what were you holding out from Seattle in connection with traffic to Alaska, as far as the shippers were concerned?
A. General commodities.
Q. How frequently were you holding out service?
A. I would say probably an average, a trip and a half, two trips a week, offhand.
Q. Now, do you have an interline arrangement in Seattle with connecting carriers?
A. Yes, we interline with United Buck-

ingham, and one time, Arctic Express, both in Seattle and Great Falls, and other carriers."

The Sub 3 transcript also shows, at P 23, L 4-23:

"Q. (by Mr. LaBissoniere) Now, directing your attention to Exhibit 7 for identification, does that show your gross operating revenue by years?
A. Yes, it does.
Q. Now, you will observe that your gross operating revenue declined--strike that. This is for a twelve-month period, each year ending March 31, 1959--I mean ending March 31 of each year?
A. Yes.
Q. Are you on a fiscal basis?
A. Yes.
Q. There is a decline in your revenue by some ninety thousand dollars for the period ending March 31, 1963, as against a comparable period for the years before. Why is that?
A. Well, there is a decline of--in excess of a hundred thousand dollars, primarily because of the--Garrison began hauling the mail in the fall of 1961, late in the fall, and with the frequent service that they were able to offer with this subsidized operation, there became less and less truckloads or LTL traffic available and just became a steady decline since that time."

The Sub 3 transcript also shows on P 24, L 23-25 and P 25, L 1-17:

"Q. Who was competing on the highway with you?
A. The one consistent competitor that I felt up to the time of Consolidated's operation on the mail is Lynden Transfer. Prior to that, I was never aware

of any, for example, from Weaver Brothers or Garrison (Consolidated-Freightways).

Q. Prior to that. And now, how much is shown by that exhibit; how much did your revenue decline according to this?

A. A hundred seven thousand dollars.

Q. How much of that was attributable to decline of highway operations?

A. I would say that--practically all of it.

Q. I see. Did you still run the highway at all from time to time?

A. On a very frequent basis, whatever we would acquire, anything that could move.

Q. Do you still have facilities in Seattle?

A. Yes, Sir.

Q. Do you still solicit and try to get freight over the highway out of Seattle?

A. Yes."

In view of this testimony and Exhibit 7 showing gross revenues at March 31, 1962 at $474,000 and at March 31, 1963 at $367,000, it is apparent there was a decline in revenue after the awarding of the mail contract to Consolidated, but nothing that could be reasonably construed as an "abrupt cessation".

The Review Board, in its order of Dec. 8, 1964, P 10, and the District Court, in its Opinion (J.S. App A [d]), both point to the fact that the record does not contain evidence of non-household movements subsequent to January of 1962. Exhibit 7 shows that in the year and a half preceding this hearing, we had gross operating revenues of approximately $600,000. Obviously, we had continued our operations as reflected in Exhibits 2, 3, and 4. We have already shown the reason for submitting Exhibit 5,

representative household goods shipments at this hearing. Appellant had been advised that Mr. Cheseldine, who had heard the "grandfather" proceeding, would also be the hearing officer in the Sub 3 proceeding. Approximately one month prior to this hearing, Mr. Lantz visited Washington, D.C. While there he conferred with Chief Examiner Cheseldine and other top Commission personnel. He sought advice as to how extensive a presentation would be necessary at this hearing. He was advised that although his "grandfather" application had been denied on a purely technical basis, his many years of uncontested operating under color of right and color of law eliminated the necessity of an extensive presentation. He was further advised that a few representative shipper witnesses from the major population areas of Alaska would suffice and that the representative shipment exhibits from the "grandfather" proceeding could be submitted, without their underlying documents, to show evidence of prior operations. He was also advised that if North American appeared as a protestant, it would be necessary to have a brief household goods shipment exhibit. This is the reason Exhibit 5 was submitted, but no general commodity exhibits were submitted. (Please note that the three witnesses supporting general commodities were from the three population centers; Mr. Streeper from southeastern Alaska [Ketchikan]; Mrs. Delia Pruhs from Fairbanks and Mr. Tom Harris of Anchorage. The one household supporting witness, Mr. Jay Burnett, is Anchorage manager of the firm of Ernst & Ernst.)

There was nothing untoward in the

Commission's advising appellant. As a matter of fact, in view of all Alaska domiciled carriers' utter lack of knowledge of regulatory matters, any one of them could and did receive advise from the Commission as to how their applications should be filed and what should be presented in their hearings. It should be noted that Congress omitted the term "bona fide" operations in the Alaska "Grandfather" Amendment to the Act. This term had been included in all prior "grandfather" amendments. This was interpreted by the Commission as a Congressional mandate that Alaska carriers should be treated with liberality. (See Al Renk & Sons, Inc., 89 M.C.C. 91 and Herda Alaska Truck Lines, Inc., MC-113573 Sub 5, 98 M.C.C. 142, 143.)

Further, in view of appellant's being denied "due process" by the Commission's not setting this matter for hearing in 1960, or at latest 1961, evidence subsequent to 1962 is not relevant to the granting of this application.

VII

THE DISTRICT COURT ERRED IN NOT RECOGNIZING THAT OPERATIONS PERFORMED UNDER COLOR OF RIGHT PRIOR TO THE FILING OF THE "GRANDFATHER" APPLICATION WERE PERMITTED BY THE COMMISSION BECAUSE OF THE HISTORIC CONTENT OF PREVIOUS "GRANDFATHER" AMENDMENTS TO THE ACT, WHICH LEGITIMATIZED SUCH OPERATIONS

The District Court in its Opinion (J.S. App A [e]) states:

"In separate proceedings in December of 1959 applicant was granted temporary authority to transport general commodities between Alaska and Seattle and

Great Falls; but household goods were specifically excluded from that grant of authority. From that date forward, at least, applicant was fully aware that it was prohibited by law from transporting household goods between the continental United States and Alaska. We hold that applicant's shipments of household goods subsequent to that date were in wilful violation of the law and therefore are not admissible to show the need for the services provided."

The District Court in finding that we were in "wilful violation of the law" because household goods had been excluded from our grant of Temporary Authority in 1959 failed to recognize that there were two parallel, but distinctly different, situations related to operating authority. This TA, excluding household goods was MC-118520 Sub 4. It had been filed pursuant to Sec. 210(a) of the Act. The stringent provisions of this Section require a showing of an immediate and urgent need. We could not prove an immediate and urgent need for the household authority. The Temporary Authorities Board gave no weight to our evidence of prior operations moving household goods. It was treated as a run-of-the-mill TA application. Mayflower at 20 M.C.C. 633, is the criteria set by the Commission and has been constantly restated through the years. It has established the fact that the non-recurring nature of household traffic makes the securing of shipper witnesses virtually impossible.

While this TA excepted household goods, our original authority, MC-118520 TA, granted Jan. 5, 1959, did authorize the origination of interstate household traffic. After receiving the Sub 4 TA in

September of 1959, authorizing the movement of general commodities between Alaska and Seattle and Great Falls, we could lawfully move household goods as an "emigrant movable" between these points. Under the generic heading "General commodities" emigrant movables are included unless explicitly excluded. They are described as a general commodity in the National Motor Freight Classification under Item No. 100200. It also names class ratings and minimum rate factors. All highway general commodity carriers move household goods in this manner. The difference between the movement of household goods, as defined by the Commission, and emigrant movables as a general commodity is that a general commodity carrier cannot perform accessorial services, such as packing barrels of china, at origin unless he has specific household authority, as defined by the Commission, covering the point of origin. Since we had household authority, as defin ed by the Commission, between points in Alaska we could perform accessorial services at point of origin and under our general commodity authority lawfully transport these shipments to Seattle or Great Falls as emigrant movables.

The parallel situation falls under color of right operations during the pendency of "grandfather" legislation. The enabling legislation for Alaska statehood did not contain a "grandfather" clause. As repeatedly testified to, and unrefuted, appellant was advised and encouraged to continue operations with the full knowledge of the Commission. It was permitted to participate in household goods tariffs subject to Commission approval, covering

operations purportedly illegal and in wilful violation of the law. Commission personnel advised appellant that due to the historic background of "grandfather" legislation which permits an interim application to allow a carrier to continue operations without a certificate until such time as there is a final determination of its application, he could continue his existing operation.

In the lower court, our motion for a new trial contains Exhibit 10, an affidavit of Mr. William F. Meehan, Jr., who was the District Supervisor of the Commission in Alaska during 1958 and 1959. It states:

"2. During the first years of I.C.C. jurisdiction in Alaska there were at least four out of the ten or so carriers operating over the highway from Washington and Montana to Alaska who had color of right operations in that they had some I.C.C. authority, but who did not have technically proper authority for the services they were performing.

3. At this time all concerned expected the enactment of a grandfather clause in the Interstate Commerce Act which would legitimize these operations as had past like amendments to the Act.

4. On instructions from the Commission no formal action was taken against interstate carriers during this time, it being felt that carriers in the position of Alaska Truck Transport, Inc. who had operated over the Alaska Highway between Alaska and points in Montana or Washington could not reasonably be expected to cease operations when the continuing of their color of right operations was, judging from past Acts, reasonably expected to entitle them to

certificates of jurisdiction such as were usually made available to those actually in operation on the date I.C.C. jurisdiction was expended or extended to cover them."

The Commission in giving tacit approval to continued operations during the pendency of "grandfather" legislation is justified historically under 206(b). It states:

"Any carrier which, on the date this subparagraph takes effect, is engaged in an operation of the character specified in the foregoing provisions of this subparagraph, but was not engaged in such operation on March 1, 1950, may under such regulations as the Commission shall prescribe, if application for a certificate is made to the Commission within one hundred and twenty days after the date on which this subparagraph takes effect, continue such operation without a certificate pending the determination of such application in accordance with Section 207(a)."

Section 203(b6)(c) of the Act, as amended, contains similar provisions.

Certainly, no reasonable mind could find us guilty of "wilfully flouting the law".

VIII

PROOF OF INADEQUACY OF EXISTING SERVICE IS NOT A REQUIREMENT FOR THE GRANTING OF AUTHORITY

Appellees, North American and Lynden, allege the Commission erred in granting a certificate to appellant without specifically finding North American's and Lynden's service to be inadequate. Even assuming their services were capable of

meeting the needs of the supporting shippers, it is settled that this fact alone would not preclude a certification of another carrier in the presence of other relevant factors. The determination of public convenience and necessity in a Section 207 proceeding includes a consideration of such factors as the desirability of competition, the desirability of different kinds of service and the desirability of improved service. A factor considered by the Commission was that the appellant has combined (without comingling) movements of household goods and general commodities (Sub 3 Trs P 104, L 11-19; P 109, L 14-23). The full Commission noted in Alaska Truck Transport, Inc. 98 M.C.C. at 678 that applicant has transported small general commodity and household goods movements in specially equipped vans and that it does not appear that protestants herein are either authorized or inclined to undertake this method of transportation. Thus, appellant's operations would provide shippers with a "different kind of service" per the teaching of Nashua Motor Express, Inc. v. United States (Supra).

North American contends the Commission erred because in United Van Lines, Inc., Extension-Alaska, 99 M.C.C. 331 (1965) the Commission denied seven applications for all-highway household goods authority between the U.S. and points in Alaska because the only certificated all-highway carrier, North American, was capable of handling the traffic involved and should be protected from diversion. In the instant case, Alaska Truck Transport,Inc. was granted authority to transport household goods between Great Falls and points in Alaska without making a specific

finding of inadequacy of service by North American and, in effect, that North American would not be seriously affected by appellant's operations. The record proves the inadequacy of North American's service between Seattle and Alaska.

Although North American claims that the Commission must find the existing motor service to be inadequate before certificating a new applicant, there is abundant authority to the contrary. (See Campus Travel, Inc. v. United States, 224 F Supp 146 (S.D.N.Y. 1963); Sloan's Moving & Storage Co. v. United States, 208 F Supp 567 (E.D.Mo. 1962); Convoy Co. v. United States, 200 F Supp 10 (D. Ore. 1961); Associated Transport, Inc. v. United States, 169 F Supp 769 (E.D. Mo. 1958); Dance Freight Lines, Inc. v. United States, 149 F Supp 367 (E.D. Ky. 1957); St. Johnsbury Trucking Co. v. United States, 99 F Supp 977 (D Vt. 1951) and C. E. Hall & Sons, Inc. v. United States, 88 F Supp 596 (D Mass. 1950).)

In announcing its adherence to this principle, the United States District Court for the District of New Hampshire, in Nashua Motor Express, Inc. v. United States, 230 F. Supp. 646 (1964), stated (at 652):

" However, the relatively numerous cases decided in this area offer ample and convincing testimony to the effect that such expressions as "showing of inadequacy of protestants' services" have customarily been used in the far narrower and more particular sense which the words themselves denote. These cases show that inadequacy of present service is not a term which is convertible with that of public convenience and necessity, but is, rather,

only one element to be considered in arriving at the broader determination of public convenience and necessity. Indeed, the very issue in much of this litigation has been how much significance to attach to that one element. Other elements of importance appear to be the desirability of competition, the desirability of different kinds of service, and the desirability of improved service.

Thus faced with the question of which of two possible constructions to place upon the words of the Commission, we conclude that it is more probable that the Commission intended the narrower customary interpretation we have just described. This being the case, we understand the Commission to have thereby enunciated a rule of law to the effect that a showing of inadequacy of the present service of protestants is an element indispensable to the ultimate finding of public convenience and necessity of proposed (or existing) service. While there is some authority for this view, e.g., Hudson Transit Lines, Inc. v. United States, 82 F Supp 153 (D.C.S. D.N.Y. 1948), aff'd 338 U.S. 802, 70 S. Ct. 59, 94 L.Ed. 485 (1949), we feel the better rule is embodied in the more numerous cases to the contrary. (Emphasis supplied.)

After enunciating the above mentioned principle that in a Section 207 proceeding the Commission need not make a specific finding that the present service is inadequate and citing as authority many of the cases listed, supra, such as Sloan's Moving & Storage, Convoy, Associated Transport, Inc., and St. Johnsbury Trucking, the court continued in the following

significant language (at 653):

"The converse of this proposition is that the absence of a finding of inadequacy is not alone sufficient to bar the issuance of a certificate when other facors justify a finding of public convenience and necessity. The element of inadequacy is thus not a controlling one, but is to be considered along with the other factors mentioned above. Even apart from the cases cited, it appears to be the more reasonable view that the narrow conceptual element of inadequacy of present service was not intended to be imposed as a straight jacket upon the process of determining the broader interests of public convenience and necessity in the effectuation of the National Transportation Policy. We find nothing in the broader discussion of this policy which would urge a contrary view. See, e.g., Schaffer Transportation Co. v. United States, 335 U.S. 83, 87-93; I.C.C. v. Parker, 326 U.S. 60, 66-70, . . ."

In a very recent opinion, the United States District Court for the Southern District of Texas, in Texas Mexican Railway Co. v. United States, 250 F. Supp. 946 (1966), cited Nashua Motor Express with approval in holding (at 950):

" We agree that inadequacy of present service is certainly an element to be considered in arriving at a determination of public convenience and necessity, but not that a specific finding of inadequacy is necessary. (Sloan's Moving & Storage Co. v. U.S.)"

An even more recent decision (Aug. 19,1966) also holding that the Commission need not make a specific finding of the inadequacy of service is Petroleum Carrier Corp. v.

United States (M.D. Fla.), 1966 Federal Carrier Cases 81,844, p. 53,222, at 53,224 in which the court quoted the above statement from the opinion in Texas Mexican.

IX

THE DISTRICT COURT ERRED IN FINDING THE HOUSEHOLD GOODS SERVICE OF NORTH AMERICAN VAN LINES, INC. ADEQUATE

The District Court completely ignored the testimony in the Sub 3 hearing of Mr. Maxfield that North American's highway operation was between Great Falls, Mont. and points in Alaska and the fact that their shipment exhibits showed no shipments to or from Alaska and west coast states via direct highway service through Seattle. He further testified that any traffic from the west coast destined for Alaska moved through the port of Seattle by water and was handled by their agent, Smyth. He also testified that they do not show any shipments through Seattle, thence through the Montana gateway to Alaska. North American's Exhibit 15 showed a total of 480,860 pounds. He testified that this was the total Alaska traffic handled in a one year period. It should be noted that our representative shipment list, Exhibit 4, shows 130,000 pounds of household goods moved in one year and that this represented only about 20% of the total handled. Obviously, we handled at least an amount equal to North American in one year. This would certainly indicate that our household operations were substantial.

The Sub 3 transcript P 144, L 19-25; P 145, L 1-3 and 21-25; P 146, L 1-25; and P 147, L 1-8 and 23-25 shows:

"Mr. Maxfield: All right. North

American Van Lines has been operating over the highway between points in the south forty-Eight States and Alaska since 1952, and continuously and probably has two highway vans, forty-foot, pads and van, drop-frame, and thirty-five foot drop-frame, and a flatbed trailer on which containers are placed. This operation is between Great Falls, Montana and points in Alaska. And the exhibit marked for identification number 15 sets out the shipments transported between April 1, 1963, and the purpose of that is to show the operation is continuing.

Mr. LaBissoniere: Turn to your Exhibit 15 and you will agree, sir, will you not, there is not a single origin or destination shown thereon in the State of Washington?

Mr. Maxfield: Yes.

Mr. LaBissoniere: You don't run any highway service, then, out of Seattle to Alaska, do you, via the Blaine-Sumas gateway?

Mr. Maxfield: No, not a regular service.

Mr. LaBissoniere: In other words, all your operation is out of the Midwest or East via the Sweetgrass gateway and into Alaska, is that right, sir?

Mr. Maxfield: Not necessarily out of the Midwest. We serve, as I think this exhibit will reflect, most all of the states in the United States. There are two or three states on which there is no tonnage from, through the Great Falls operation.

Mr. LaBissoniere: Right.

Mr. Maxfield: That is primarily on the west coast.

Mr. LaBissoniere: You also have a water operation between Seattle and points in Alaska, the same as the other carriers, don't you?

Mr. Maxfield: We don't have that operation, we ship tonnage through Seattle--
Mr. LaBissoniere: Right.
Mr. Maxfield: by utilizing Smyth.
Mr. LaBissoniere: Oh, you bring it, when you have any freight out of California or Washington or Oregon that is going to Alaska, you bring it to Seattle and turn it over to Smyth where they containerize it and put it on water and take it to Alaska?
Mr. Maxfield: That is right.
Mr. LaBissoniere: You don't purport to hold out any highway service from points in Washington, Oregon or California to points in Alaska?
Mr. Maxfield: Yes, we perform that transportation.
Mr. LaBissoniere: Well, when have you ever done so?
Mr. Maxfield: I can't cite a specific example.
Mr. LaBissoniere: And you don't have any on your exhibit?
Mr. Maxfield: No, sir.
Mr. Labissoniere: . . do you show any shipments via the Sweetgrass gateway out of Seattle?
Mr. Maxfield: No."

It is evident from the foregoing testimony of North American's representative that they offer no service through Seattle except that of their agent, Smyth, who moves via water. They admit that they offer no highway service between Seattle and Alaska.

The full Commission in Alaska Truck Transport, Inc., Extension-Alaska, 99 M.C.C. at 677 states:

"North American apparently is the only carrier now holding household goods all-highway authority between the con-

tinental United States and Alaska and providing such service in fact. It uses only the sea route from the west coast; thus the only duplication resulting from grant of applicant's proposal would extend only over the Sweetgrass route. North American argues that the relatively small amount of all-highway traffic available to it should not be rendered subject to diversion because of the probable resulting weakening of its service. This argument, however, loses substantial force since both North American and applicant have been in competition for all-highway traffic over the Sweetgrass route since 1958, with no demonstrated ill effects on North American's operation. Applicant's volume of household goods movements must be considered relatively substantial, considering the magnitude of applicant's overall operation."

It is apparent that the full Commission rightfully found appellant entitled to household goods authority between both Seattle and Great Falls and points in Alaska.

X

THE FULL COMMISSION, ON ITS OWN MOTION, REOPENED MC-118520 SUB 3 FOR FURTHER ORAL HEARING IN ANCHORAGE, ALASKA JULY 18, 1967

Appellee, in his motion to affirm, P 6, para 3, chose to interject the fact that the Commission, on its own motion, reopened this Sub 3 proceeding for further hearing. We so noted this as an intervening matter in our Foreward. Appellee states that since we have an additional remedy before the Commission, that nothing is to be

gained in further relitigating the questions at issue in this matter. Admittedly, the reopening by the Commission for further hearing is highly unusual, perhaps unprecedented, after receiving a Decree from a Court. This remedy was not a matter of right available to appellant. This was an action solely within the discretion of the full Commission. Appellant in the further hearing, adduced additional evidence not present in this record. If it should result in a grant of authority, the same as at issue herein, appellee North American has indicated it will apply to the Federal Court for an additional injunction on the ground that the Commission has violated its jurisdiction by granting a further hearing.

Just before the closing of this further hearing the Examiner requested briefs from applicant and protestants. North American's brief, dated Aug. 25, 1967, P 18, para 2 and 3, and P 19, para 1 states:

"When the Court remanded this case to the Commission it expected the agency to act "consistent" with the Court's opinion, that is, to merely reissue the certificate exclusive of Seattle, Washington and the commodity "household goods". The Court's opinion seems clear that the Commission is not authorized to grant further hearings or to reach different results, particularly since the proceeding long ago became administratively final.

Because the Commission has apparently chosen to ignore the Court's mandate and injunction, North American and Lynden Transfer could and obviously would reapply to the Federal Court for an additional injunction on the ground that the Commission has violated its jurisdiction

by granting a further hearing. The Commission is therefore respectfully requested to cure its own jurisdictional defect. Accordingly, North American moves that these further proceedings be dismissed on the ground that the matter is administratively vinal and that the Commission lacks jurisdiction to grant further hearings or to further review or reconsider the matter except to the extent of correcting Applicant's certificate "consistent" with the Court's opinion."

While the foregoing is an intervening matter not in this record, it is set forth verbatim to show that while appellee, Lynden Transfer, in his motion to affirm says we have an additional remedy before the Commission; appellee, North American, speaking out of the other side of its mouth, is telling the Commission that unless this additional remedy, the further hearing, is dismissed, appellees could and obviously would reapply to the Federal Court for an additional injunction on the ground that the Commission has violated its jurisdiction.

The deleting of the authority at issue herein has in the past generated 85% of appellant's revenue. It has had a tremendous financial impact upon him. It would appear that appellees are aware that by delaying through further litigation or Commission proceedings appellant will be destroyed and an ultimate favorable Court or Commission decision will be of no significance. If the Commission, as a result of this further hearing, issues a favorable order appellee-protestants could file exceptions to the order; if these were denied, they could file petitions for reconsideration; if again denied, they could

again proceed in the Courts. If, as a result of appellee's motion to affirm, the Supreme Court affirms the District Court, in further litigation the position of the Commission and the appellant would be indefensible since the entire record of prior operations would have been declared unsubstantial, in wilful violation of the law and inadequate to support a grant of authority. The additional remedy would be a nullity.

It is appellant's position that if the full Commission, based on the record herein, could arrive at a favorable decision, then, in view of the clarifications and arguments set forth in this brief, the Supreme Court will reverse the decision of the lower court on this same record.

CONCLUSION

The findings made by the Interstate Commerce Commission are supported by law. The same cases quoted by the District Court, when properly interpreted, support the position of the Commission in this case. The grant of authority is supported by substantial evidence of record misinterpreted by the District Court.

The finding by the District Court that operations conducted during the pendency of appellant's "grandfather" application were in wilful violation of the law is an error at law. Part II, Section 206(a)(4) of the Interstate Commerce Act gives these operations "color of law". Granting the motion to affirm would be finding this Section of the Act unconstitutional.

Appellant was denied due process of law when the Commission for its own administrative convenience failed to set this

matter for a timely hearing. Five years elapsed between the filing of the application for this Sub 3 authority and the issuance of an order.

It is evident that the District Court misinterpreted and grossly misapplied the the standard for determining the substantiality of the evidence, set forth by this Court in Consolo v. Federal Maritime Commission 383 US 607, 619-621. The District Court further misinterprets what evidence is admissible to show a need of public convenience and necessity when such evidence resulted from an operation without authority. It misapplies the findings in both Armored Carrier Corp. v. United States, 260 F Supp 612 (E.D.N.Y. 1966) and Best Way Motor Freight, Inc. v. United States, 253 F Supp 314, 319 (WD Wash. 1966), which actually support the grant of authority by the Commission.

The District Court's finding that inadequacy of existing carriers' service must be shown is countered through the principle shown in Nashua Motor Express, Inc. v. United States, F Supp 646 (1964) and a long line of other cases.

Appellee, Lynden Transfer, contends appellant was granted an additional remedy by the Commission's ordering further hearings. Appellee, North American, contends the Commission violated its jurisdiction in holding further hearings, and that unless the further hearing is dismissed, appellees would reapply to the Federal Court for an additional injunction. Even if the so called additional remedy is favorably resolved, affirmation of the lower court by this Court would negate the entire record and the position of the Commission and the appellant would be indefensible in further litigation.

Appellant submits that the questions presented by this appeal are substantial and of general public importance and merit full consideration by this Court and that the Decree of the District Court should be reversed.

Respectfully submitted,

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